compensation reforms.[1867] The jurisdictional separations process, which has been frozen for some time, is currently the subject of a referral to the Separations Joint Board.[1868] Any carrier seeking additional recovery will be required to conduct a separations study to demonstrate the current use of its facilities. Although this is a burdensome requirement, it is not unduly so given the importance of protecting consumers and the universal service fund.

XIV. INTERCARRIER COMPENSATION FOR VOIP TRAFFIC

933. Under the new intercarrier compensation regime, all traffic—including VoIP-PSTN traffic—ultimately will be subject to a bill-and-keep framework. As part of our transition to that end point, we adopt a prospective intercarrier compensation framework for VoIP traffic. In particular, we address the prospective treatment of VoIP-PSTN traffic by adopting a transitional compensation framework for such traffic proposed by commenters in the record.[1869] Under this transitional framework:

- We bring all VoIP-PSTN traffic within the section 251(b)(5) framework;
- Default intercarrier compensation rates for toll VoIP-PSTN traffic are equal to interstate access rates;
- Default intercarrier compensation rates for other VoIP-PSTN traffic are the otherwise-applicable reciprocal compensation rates; and
- Carriers may tariff these default charges for toll VoIP-PSTN traffic in the absence of an agreement for different intercarrier compensation.

We also make clear providers' ability to use existing section 251(c)(2) interconnection arrangements to exchange VoIP-PSTN traffic pursuant to compensation addressed in the providers' interconnection agreement, and address the application of Commission policies regarding call blocking in this context.

934. Although we adopt an approach similar to that proposed by some commenters, our approach to adopting and implementing this framework differs in certain respects. For one, we are not persuaded on this record that all VoIP-PSTN traffic must be subject exclusively to federal regulation, and as a result, to adopt this prospective regime we rely on our general authority to specify a transition to bill-and-keep for section 251(b)(5) traffic.[1870] As a result, tariffing of charges for toll VoIP-PSTN traffic can occur through both federal and state tariffs.[1871] In addition, given the recognized concerns with the use of telephone numbers and other call detail information to establish the geographic end-points of a call, we decline to mandate their use in that regard, as proposed by some commenters.[1872] We do, however, recognize concerns regarding providers' ability to distinguish VoIP-PSTN traffic from other traffic, and,

---

[1867] *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4730, para. 563. *See also, e.g., 2008 Order and USF/ICC FNPRM*, 24 FCC Rcd at 6632, App. A, para. 304 (seeking comment on an approach that would refer certain recovery questions to the Separations Joint Board give the cross-jurisdictional implications of the possible approach to recovery).

[1868] *See, e.g., Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report and Order, 26 FCC Rcd 7133 (2011)

[1869] ABC Plan, Attach. 1 at 10; Joint Letter at 3; NCTA July 29, 2011 *Ex Parte* Letter at 2; New York PSC *August 3 PN* Comments at 18-19; TCA *August 3 PN* Comments at 10-11.

[1870] *See infra* paras. 954-955.

[1871] *See infra* paras. 961-963.

[1872] *See infra* para. 962.

consistent with the recommendations of a number of commenters, we permit LECs to address this issue through their tariffs, much as they do with jurisdictional issues today.[1873]

935. We believe that this prospective framework best balances the competing policy goals during the transition to the final intercarrier compensation regime. By declining to apply the entire preexisting intercarrier compensation regime to VoIP-PSTN traffic prospectively, we recognize the shortcomings of that regime. At the same time, we are mindful of the need for a measured transition for carriers that receive substantial revenues from intercarrier compensation. Although our action clarifying the prospective intercarrier compensation treatment of VoIP-PSTN traffic does not resolve the numerous existing industry disputes, it should minimize future uncertainty and disputes regarding VoIP compensation, and thereby meaningfully reduce carriers' future costs.[1874]

A. Background

936. Questions regarding the appropriate intercarrier compensation framework for VoIP traffic have been raised in a number of previous rulemaking notices from varying perspectives and in varying levels of detail.[1875] Most recently, in the *USF/ICC Transformation NPRM* the Commission sought "comment on the appropriate treatment of interconnected VoIP traffic for purposes of intercarrier compensation," asking about "a range of approaches, including how to define the precise nature and timing of particular intercarrier compensation payment obligations."[1876] To inform this analysis, the Commission sought comment on how best to balance competing policy concerns, the possible need to clarify or modify any aspects of existing law to enable the adoption of a particular VoIP intercarrier compensation regime, and how any such regime would be administered, including the appropriate scope of traffic that should be addressed by the Commission.[1877] In addition, in the *August 3 PN*, we sought comment on measures to clarify the operation of one proposed approach to intercarrier compensation for VoIP-PSTN traffic.[1878]

B. Widespread Uncertainty and Disagreement Regarding Intercarrier Compensation for VoIP Traffic

937. As the Commission recognized in the *USF/ICC Transformation NPRM*, the lack of clarity regarding the intercarrier compensation obligations for VoIP traffic has led to significant billing

---

[1873] *See infra* para. 963.

[1874] This Order does not address intercarrier compensation payment obligations for VoIP-PSTN traffic for any prior periods. *See, e.g.*, Letter from Grace Koh, Policy Counsel, Cox, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, Attach. at 1 (filed July 1, 2011) (Cox July 1, 2011 *Ex Parte* Letter).

[1875] *See, e.g., Intercarrier Compensation NPRM*, 16 FCC Rcd at 9613, 9621, 9629, para. 6 n.5, paras. 24, 52 (seeking comment on comprehensive intercarrier compensation reform, including issues presented by "IP telephony"); *IP-Enabled Services NPRM*, 19 FCC Rcd at 4904-05, paras. 61-62 (seeking comment on the application of intercarrier compensation charges to VoIP or other IP-enabled services); *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4710, 4722, 4743-44, 4750, paras. 51, 80, 133 & n. 384, 148; *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6589-91, 6594, App. A, paras. 209-11, 218 n.703; *id.* at 6787-89, 6792, App. C, paras. 203-06, 213 n.1844.

[1876] *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4745, para. 609.

[1877] *Id.* at 4747-48, paras. 612-13.

[1878] *See August 3 Public Notice*, 26 FCC Rcd at 11128. For instance, we sought comment on mechanisms for distinguishing "toll" VoIP-PSTN traffic from other traffic, including possible alternatives to the use of call detail information as proposed by the ABC Plan and Joint Letter. *Id.* at 11129.

disputes and litigation.[1879] Both state commissions and courts have been called upon to address disputes regarding intercarrier compensation for VoIP traffic in a range of contexts and with a range of outcomes. For example, some states have held that the same intrastate access charges that apply in the context of traditional telephone service also apply to at least some VoIP traffic.[1880] Others have applied lower intercarrier compensation charges in certain circumstances,[1881] and still others have deferred to the Commission.[1882] Courts likewise have addressed disputes about the intercarrier compensation payments associated with VoIP traffic, reaching divergent outcomes.[1883] In a number of cases, the state commission's or court's decision hinged in part on the language of particular tariffs or agreements.[1884] Disputes also remain pending in a number of courts and state commissions.[1885]

[1879] *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4745-47, 4748, paras. 610-11, 614.

[1880] *See, e.g., Sprint v. Iowa Telecom*, Docket No. FCU-2010-0001, Order (Ia. Util. Bd. rel. Feb. 4, 2011) (applying intrastate access charges); *Re Southwestern Bell Telephone Company dba AT&T Kansas*, Docket No. 10-SWBT-419-ARB, Order Adopting Arbitrator's Determination of Unresolved Interconnection Agreement Issues Between AT&T and Global Crossing (Kan. Corp. Comm'n rel. Aug. 13, 2010) (same); *Palmerton v. Global NAPS*, Docket No. C-2009-2093336, Motion of Chairman James H. Cawley (Pa. PUC rel. Feb. 11, 2010) (same); *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Tel. Co., and Wilton Telephone Co.*, DT 08-28, Order No. 25,043 (NH PUC Nov. 10, 2009) (same).

[1881] *See, e.g., Petition of UTEX Communications Corporation For Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act and PURA for Rates, Terms, and Conditions of Interconnection Agreement With Southwestern Bell Telephone Company*, Docket No. 26381, Arbitration Award (Tx. PUC rel. Jan. 27, 2011) (holding that AT&T may not charge for traffic covered by the ESP exemption, and that for other traffic compensation should be paid pursuant to the interconnection agreement's terms, as applicable). Other state commissions have held that reciprocal compensation rates apply, but subsequent legislative actions have raised questions about those decisions. Letter from VON et al, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 06-122, 05-337, 04-36, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51 at 3 n.9 (filed Aug. 3, 2011) (VON et al. Aug. 3, 2011 *Ex Parte* Letter) (discussing circumstances in Missouri and Wisconsin).

[1882] *See, e.g., Re Level 3 Communications*, Docket UT-063006, Order 12 (Wa. UTC rel. June 7, 2007) (deferring to the Commission); *Re Level 3 Communications LLC*, Docket Nos. 70043-TK-05-10, 70000-TK-05-1132, Memorandum Opinion, Findings and Order, Record No. 9891 (Wy. PSC rel. Apr. 30, 2007) (same); *Re Florida Digital Network, Inc. dba FDN Communications*, Docket No. 041464-TP, Order on Arbitration, PSC-06-0027-FOF-TP (Fl. PSC rel. Jan. 10, 2006) (same).

[1883] *See, e.g., Global NAPS California v. Pub. Util. Comm'n of State of Calif.*, 624 F.3d 1225, 1231-32 (9th Cir. 2010) (affirming state commission decision that access charges apply); *Central Tel. Co. of Va. v. Sprint Communications Co. of Va.*, Civil Action No. 3:09cv720, Slip Op., 2011 WL 778402, *8 (E.D. Va. rel. Mar. 2, 2011) (holding that access charges apply); *Manhattan Telecommunications Corp. v. Global NAPS*, No. 08 Civ. 3829(JSR), Slip Op., 2010 WL 1326095, *3-4 (S.D.N.Y. rel. Mar. 31, 2010) (holding that, as a matter of equity, interstate access rates apply); *Global NAPS Ill. v. Il. Commerce Comm'n*, 749 F.Supp.2d 804, 814-16 (N.D. Il. 2010) (upholding state commission decision applying intercarrier compensation charges even if traffic was VoIP); *PAETEC v. CommPartners*, No. 08-0397, slip op., 2010 WL 1767193, *5 (D.D.C. Feb. 18, 2010) (finding that "the access charge regime is inapplicable to VoIP originated traffic").

[1884] *See, e.g., Global NAPS v. Pub. Util. Comm'n of State of Calif.*, 624 F.3d at 1231-32; *Central Tel. Co. of Va. v. Sprint*, 2011 WL 778402, *8; *Global NAPS v. Il. Commerce Comm'n*, 749 F.Supp.2d at 814-16.

[1885] XO Section XV Comments at 9-10 (citing cases and proceedings); Letter from J.G. Harrington, counsel for Cox, to Sharon Gillett, Chief, Wireline Competition Bureau, FCC, CC Docket No. 01-92, Attach. (filed Sept. 29, 2011) (same).

938. In addition to formal litigation, the record reveals numerous informal disputes in this area.[1886] In some cases, carriers may receive some intercarrier compensation payments at something less than the full intercarrier compensation rates charged in the case of traditional telephone service.[1887] In other cases, terminating carriers state that they receive no intercarrier compensation payments at all for traffic that is, or is alleged to be, VoIP traffic.[1888] Further, some providers cite asymmetries in payments, where, for example, some VoIP providers' wholesale carriers charge full access charges while refusing to pay them to the terminating LEC.[1889]

939. Against this backdrop, and the fact that the current uncertainty and associated disputes are likely deterring innovation and introduction of new IP services to consumers, we find it appropriate to address the prospective intercarrier compensation obligations associated with VoIP-PSTN traffic. Indeed, despite the varied opinions in the record regarding the appropriate approach to VoIP-PSTN intercarrier compensation, there is widespread agreement that the Commission needed to act to address that issue now.[1890]

C. Prospective Intercarrier Compensation Obligations for VoIP-PSTN Traffic

1. Scope of VoIP-PSTN Traffic

940. The prospective intercarrier compensation regime we adopt for a LEC's exchange of VoIP traffic with another carrier focuses on what we refer to as "VoIP-PSTN" traffic.[1891] For purposes of

---

[1886] In at least some cases, parties have reached negotiated resolutions regarding the intercarrier compensation payments for VoIP traffic. For example, Verizon cites agreements it reached to exchange VoIP traffic at a rate of $0.0007 per minute. Verizon Section XV Comments at 11; Verizon Reply at 10-11; *see also* XO Section XV Comments at 33; Letter from John Nakahata, Counsel for Level 3, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 99-68, CC Docket No. 01-92, Attach. 1, Part B at 2 (filed Aug. 18, 2008) (Level 3 Aug. 18, 2008 *Ex Parte* Letter); *Re Level 3 Communications*, ARB 665, Order No. 07-098 (Or. PUC rel. Mar. 14, 2007).

[1887] *See, e.g.*, Bright House Section XV Comments at 7; Frontier Section XV Comments at 7-8; Nebraska Rural Independent Companies Section XV Comments at 5, 14-15; State Members of the USF Joint Board Comments at 21.

[1888] GVNW Section XV Comments at 4; NECA et al. Section XV Comments at 6; State Members of the USF Joint Board Comments at 21; Letter from Colin Sandy, Government Relations Counsel, NECA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-36, CC Docket No. 01-92, at 1 & Attach. (filed Sept. 23, 2009); Letter from Joe A. Douglas, Vice President, Government Relations, NECA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-36, CC Docket No. 01-92, Attach. at 2-4 (filed May 15, 2009).

[1889] *See, e.g.*, AT&T Section XV Comments at 26, 29-30; *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4745-46, para. 610 & n.920.

[1890] "While there are choices that we would prefer, we frankly think that the industry can survive and thrive on any of the likelier outcomes provided the Commission does act expeditiously and thoroughly." TEXALTEL Section XV Comments at 1. *See also, e.g.*, AT&T Section XV Comments at 28-29; Cablevision-Charter Section XV Comments at 3-13; Cbeyond et al. Section XV Comments at 4-16; NECA et al. Section XV Comments at 4-6, 8-13; Sprint Section XV Comments at 2; Washington UTC Section XV Comments at 2-5. We are unpersuaded by commenters expressing concern about the transitional VoIP-PSTN intercarrier compensation framework becoming effective January 1, 2012, when the tariff changes to effectuate the broader intercarrier compensation rate reforms will not take effect until July 1, 2012. *See, e.g.*, EarthLink *August 3 PN* Comments at 14. Given the importance of providing clarity regarding intercarrier compensation for VoIP-PSTN traffic going forward, we do not find it appropriate to delay its effectiveness.

[1891] We use the term "VoIP-PSTN" as shorthand. We recognize that carriers have been converting portions of their networks to IP technology for years. *See, e.g.*, *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC (continued...)

this Order, we adopt the definition of traffic proposed in the Joint Letter: "VoIP-PSTN traffic" is "traffic exchanged over PSTN facilities that originates and/or terminates in IP format."[1892] In this regard, we focus specifically on whether the exchange of traffic between a LEC and another carrier occurs in Time-Division Multiplexing (TDM) format (and not in IP format), without specifying the technology used to perform the functions subject to the associated intercarrier compensation charges.[1893]

941. Although the *USF/ICC Transformation NPRM* proposed focusing specifically on interconnected VoIP services, we note that the Commission's existing definition of interconnected VoIP would exclude traffic associated with some VoIP services that are originated or terminated on the PSTN, such as "one-way" services that allow end-users either to place calls to, or receive calls from, the PSTN, but not both.[1894] Although these one-way services do not meet the definition of interconnected VoIP, carriers are likely to be providing origination or termination functions with respect to this traffic comparable to that of "two-way" traffic that meets the existing definition of interconnected VoIP. Moreover, intercarrier compensation disputes have encompassed all forms of what we define as VoIP-PSTN traffic, and addressing this traffic more comprehensively helps guard against new forms of arbitrage. Various commenters recommended including such traffic within the scope of our intercarrier compensation framework for VoIP[1895] or otherwise expressed support for the approach taken in the ABC

(Continued from previous page) ———————————

Rcd 10245, 10257-59, para. 24 & n.77 (2005) (*IP-Enabled Services Order*); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11541-43, para. 84 (1998). Nonetheless, many carriers today continue to rely extensively on circuit-switched technology particularly for the exchange of traffic subject to intercarrier compensation rules. *See, e.g.*, Cablevision-Charter Section XV Comments at 4; Cbeyond et al. Section XV Comments at 12 n.35; TCA Section XV Comments at 2; Cox July 21, 2011 *Ex Parte* Letter, Attach. at 1. Likewise the definition of "interconnected VoIP" uses the term "PSTN" as distinct from at least certain types of VoIP services. *See, e.g.*, 47 C.F.R. § 9.3. Thus, in the context of our VoIP-PSTN intercarrier compensation rules, our reference to "PSTN" refers to the exchange of traffic between carriers in (Time Division Multiplexing) TDM format. *See* ABC Plan, Attach. 1 at 10 n.9.

[1892] Joint Letter at 3. *See also* ABC Plan, Attach. 1 at 10. Some commenters question the scope of traffic that "originates and/or terminates in IP format." *See, e.g.*, CRUSIR *August 3 PN* Comments at 20; Level 3 *August 3 PN* Comments at 12-13. Although our prospective VoIP-PSTN intercarrier compensation is not circumscribed by the definition of "interconnected VoIP service" in section 3(25) of the Act (referencing section 9.3 of the Commission's rules) or the definition of "non-interconnected VoIP service" in section 3(36) of the Act, nonetheless, informed by those definitions, we believe it is appropriate to focus on traffic for services that require "Internet protocol-compatible customer premises equipment." *See* 47 U.S.C. § 153(25) (referencing 47 C.F.R. § 9.3); 47 C.F.R. § 9.3 (subpart (3) in the definition of "interconnected VoIP"); 47 U.S.C. § 153(36)(A)(ii) (discussing services that "require[] Internet protocol compatible customer premises equipment"). Sections 3(25) and 3(36) of the Act were adopted in section 101 of the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, § 103(b), 124 Stat. 2751 (2010).

[1893] *See, e.g.*, NECA et al. *USF/ICC Transformation NPRM* Comments at 24-25 n.54; Letter from Matthew M. Polka, President/CEO, ACA, and Michael K. Powell, President and CEO, NCTA, to Hon. Julius Genachowski, Chairman, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, at 2 (Aug. 23, 2011). We discuss in greater detail below the issues regarding what particular charges competitive LECs can impose in particular circumstances. *See infra* para. 942.

[1894] *See* 47 C.F.R. § 9.3 (defining "interconnected VoIP service"). *See also IP-Enabled Services Order*, 20 FCC Rcd at 10277, para. 58.

[1895] *See, e.g.*, Consolidated Section XV Comments at 10-11; Nebraska Rural Independent Companies Section XV Comments at 3-4; XO Section XV Comments at 13. *See also* Letter from Christopher W. Savage, Counsel for Bright House, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, at 3 (filed May 27, 2011). XO also proposes that the intercarrier compensation framework extend to "IP-enabled services that do not involve two-way voice communications, such (continued...)

Plan and Joint Letter.[1896] Based on the foregoing considerations, we are persuaded to adopt that approach.[1897]

942. We agree with concerns raised by NCTA and find it appropriate to adopt a symmetrical framework for VoIP-PSTN traffic, under which providers that benefit from lower VoIP-PSTN rates when their end-user customers' traffic is terminated to other providers' end-user customers also are restricted to charging the lower VoIP-PSTN rates when other providers' traffic is terminated to their end-user customers. We thus decline to adopt an asymmetric approach that would apply VoIP-specific rates for only IP-originated or only IP-terminated traffic, as some commenters propose.[1898] The Commission has recognized concerns about asymmetric payment associated with VoIP traffic today, including marketplace distortions that give one category of providers an artificial regulatory advantage in costs and revenues relative to other market participants.[1899] An approach that addressed only IP-originated traffic would perpetuate—and expand—such concerns. Commenters advocating a focus solely on IP-originated

(Continued from previous page) ———————————

as electronic fax-to-email services and IP-based voicemail services . . . because such traffic is indistinguishable from two-way voice calling." XO Section XV Comments at 13. However, XO does not clarify the precise definition that would be needed to encompass the specific traffic at issue, given the possible breadth of services encompassed by "IP-enabled services." *See, e.g., IP-Enabled Services NPRM*, 19 FCC Rcd at 4869-79, 4886-90, paras. 8-22, 35-37. We believe that our definition, which itself goes beyond the *USF/ICC Transformation NPRM*'s proposed focus on interconnected VoIP, strikes the appropriate balance for purposes of the transitional intercarrier compensation framework.

[1896] *See, e.g.*, ABC Plan, Attach. 1 at 10; Joint Letter at 3; NCTA July 29, 2011 *Ex Parte* Letter at 2; New York PSC *August 3 PN* Comments at 18-19; TCA *August 3 PN* Comments at 10-11.

[1897] We reject claims that applying our prospective VoIP-PSTN intercarrier compensation regime to this scope of traffic is procedurally improper. *See, e.g.*, Letter from Donna N. Lampert, Counsel for Google, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, 07-135, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, Attach. at 6 (filed Sept. 30, 2011) (Google et al. Sept. 30, 2011 *Ex Parte* Letter). The *USF/ICC Transformation NPRM* specifically sought comment on the scope of any VoIP intercarrier compensation rules, including "whether the proposed focus on interconnection VoIP is too narrow or whether the Commission should consider intercarrier compensation obligations associated with other forms of VoIP traffic, as well." *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4747, para. 612. In response, commenters proposed approaches that would encompass the scope of VoIP traffic covered by our prospective VoIP-PSTN intercarrier compensation framework, and the Commission sought comment on how it could implement such an approach. *August 3 Public Notice*, 26 FCC Rcd at 11128 (seeking comment "on the implementation of the ABC Plan's proposal for VoIP intercarrier compensation"); *id.* at 17 n.57 (discussing the scope of VoIP traffic that would be encompassed by the ABC Plan's proposal).

[1898] *See, e.g.*, Letter from Steven F. Morris and Jennifer K. McKee, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51 Attach. at 4-5 (filed July 29, 2011) (NCTA July 29, 2011 *Ex Parte* Letter); Comcast Section XV Comments at 4-7; ZipDX Section XV Comments at 2. We note that our VoIP-PSTN intercarrier compensation framework only addresses intercarrier compensation traditionally associated with intrastate and interstate traffic (i.e., access charges and reciprocal compensation), and does not address other compensation associated with international calls. *See* Comcast Section XV Comments at 4 n.4. A separate regulatory regime governs how U.S. carriers negotiate with foreign carriers for the exchange of international traffic. *See, e.g., International Settlements Policy Reform, et al.*, IB Docket Nos. 11-80, 05-254, 09-10, RM-11322, Notice of Proposed Rulemaking, 26 FCC Rcd 7233, 7234-41, paras. 3-10 (2011).

[1899] *See supra* note 1889. *See also, e.g.*, NCTA July 29, 2011 *Ex Parte* Letter at 2.

traffic implicitly recognize as much, noting that providers with IP networks could benefit relative to providers with TDM networks under such an intercarrier compensation regime.[1900]

2. Intercarrier Compensation Charges for VoIP-PSTN Traffic

943. We adopt a prospective intercarrier compensation framework that brings all VoIP-PSTN traffic within the section 251(b)(5) framework. As discussed below, the Commission has authority to bring all traffic within the section 251(b)(5) framework for purposes of intercarrier compensation, including traffic that otherwise could be encompassed by the interstate and intrastate access charge regimes,[1901] and we exercise that authority now for all VoIP-PSTN traffic.

944. We adopt transitional rules specifying, prospectively, the default compensation for VoIP-PSTN traffic:

- Default charges for "toll"[1902] VoIP-PSTN traffic will be equal to interstate access rates applicable to non-VoIP traffic, both in terms of the rate level and rate structure;
- Default charges[1903] for other VoIP-PSTN traffic will be the otherwise-applicable reciprocal compensation rates;[1904] and
- LECs are permitted to tariff these default charges for toll VoIP-PSTN traffic in relevant federal and state tariffs in the absence of an agreement for different intercarrier compensation.

945. Our intercarrier compensation framework for VoIP-PSTN traffic will apply prospectively, during the transition between existing intercarrier compensation rules and the new regulatory regime adopted in this Order, and is subject to the reductions in intercarrier compensation rates required as part of that transition. We do not address preexisting law, including whether or how the ESP exemption might have applied previously, and we make clear that, whatever its possible relevance historically, the ESP exemption is not relevant or applicable prospectively in determining the intercarrier

---

[1900] *See, e.g.*, Comcast Section XV Comments at 5-6 (arguing that the relative advantages for providers with IP networks would create incentives for providers with TDM networks to convert to IP); Comcast Section XV Reply at 10 (same).

[1901] *See supra* Section XII.A.2. Our transitional intercarrier compensation framework for VoIP-PSTN traffic applies to all LECs, including LECs that are wholesale partners of VoIP providers.

[1902] The Act defines "telephone toll service" as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(55). The Commission previously has described toll services as "services that enable customers to communicate outside of their local exchange calling areas," and that, for wireless providers, this means outside the customer's plan-defined home calling area. *See, e.g.*, *Universal Service Contribution Methodology*, WC Docket Nos. 06-122, 04-36, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 at 7543, para. 29 (*Interim Universal Service Contribution Methodology Order*). Although the Commission has referred to toll services as "telecommunications services" in some other contexts, *see, e.g.*, *id.*, our use of the term "toll" VoIP-PSTN traffic here does not prejudge the classification of VoIP services.

[1903] The default rate applicable to all non-toll VoIP-PSTN traffic is whatever rate applies to other section 251(b)(5) traffic exchanged between the carriers.

[1904] In addition to ISP-bound traffic, section 251(b)(5) traffic historically included all local traffic. In the case of traffic both originated and terminated by a LEC, the local area is defined by the state. *Local Competition First Report and Order*, 11 FCC Rcd at 16013-14, para. 1035. In the case of traffic to or from a CMRS network, section 251(b)(5) applies to traffic that originates and terminates in the same Major Trading Area (MTA). *Id.*, at 16014, para. 1036.

compensation obligations for VoIP-PSTN traffic.[1905]

a. The Prospective VoIP-PSTN Intercarrier Compensation Framework Best Balances the Relevant Policy Considerations

946. We believe that our prospective, intercarrier compensation regime for VoIP-PSTN traffic best balances the relevant policy considerations of providing certainty regarding the prospective intercarrier compensation obligations for VoIP-PSTN traffic while acknowledging the flaws with preexisting intercarrier compensation regimes, and providing a measured transition to the new intercarrier compensation framework. Our framework for VoIP-PSTN traffic will also reduce disputes and provide greater certainty to the industry regarding intercarrier compensation revenue streams while also reflecting the Commission's move away from the pre-existing, flawed intercarrier compensation regimes that have applied to traditional telephone service.[1906]

947. Although commenters did not all agree on the treatment of VoIP-PSTN traffic, there was widespread consensus among commenters that, whatever the outcome, it was essential that the Commission address that issue now.[1907] Our framework also seeks to facilitate discussions among the providers exchanging VoIP-PSTN traffic, lessening the need for prescriptive Commission regulations. At the same time, the *USF/ICC Transformation NPRM* recognized the disruptive nature of some providers' unilateral actions regarding VoIP intercarrier compensation,[1908] and we seek to prevent such actions here going forward.

948. We are not persuaded by the arguments of some commenters to subject VoIP traffic to the pre-existing intercarrier compensation regime that applies in the context of traditional telephone service, including full interstate and intrastate access charges.[1909] For one, many of the advocates of such

---

[1905] *Compare, e.g.*, Letter from Charles McKee, Vice-President, Government Affairs, Sprint, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 4-6 (filed July 29, 2011) (Sprint July 29, 2011 *Ex Parte* Letter) *with, e.g.*, AT&T Section XV Reply at 23-24. Because we are bringing all traffic within section 251(b)(5), the ESP Exemption from interstate access charges does not apply by its terms. Nonetheless, in this Order, we preserve the equivalent of the ESP Exemption outside of the VoIP-PSTN traffic context. In light of the need for clarity on a prospective basis given the ongoing disputes regarding VoIP intercarrier compensation, as well as the other policy considerations discussed below, we disagree that, as a policy matter, we should adopt the equivalent of the ESP Exemption in this context. *See, e.g.*, Google et al. Sept. 30, 2011 *Ex Parte* Letter, Attach. at 8.

[1906] As in prior Orders, we use the term "traditional telephone service" here colloquially as distinct from VoIP service without reaching any conclusions regarding the classification of VoIP services. *See, e.g., Telephone Number Requirements for IP-Enabled Services Providers; et al.*, WC Docket Nos. 07-243, 07-244, 04-36, CC Docket No. 95-116, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531, 19547, para. 28 (2007) (recognizing that interconnected VoIP services increasingly are viewed by consumers as a substitute for traditional telephone services).

[1907] *Supra* para. 939 & note 1890.

[1908] *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4748, para. 614. *See also, e.g.*, NECA et al. Section XV Comments at 6; Letter from William A. Haas, Vice President of Public Policy and Regulatory, PAETEC et al., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Feb. 1, 2011).

[1909] *See generally, e.g.*, Cablevision-Charter Section XV Comments at 3; Cbeyond et al. Section XV Comments at 4-6; Cox Section XV Comments at 8; NECA *et al.* Section XV Comments at 6; AT&T Section XV Reply at 21-22; Consolidated Reply at 10-12.

an approach subsequently endorsed the ABC Plan and Joint Letter.[1910] Further, such an outcome would require the Commission to enunciate a policy rationale for expressly imposing that regime on VoIP-PSTN traffic in the face of the known flaws of existing intercarrier compensation rules and notwithstanding the recognized need to move in a different direction. Moreover, requiring payment of all existing intercarrier compensation rates applicable to traditional telephone service traffic as part of a transitional regime for VoIP-PSTN traffic would, in the aggregate, increase providers' reliance on intercarrier compensation at the same time the Commission's broader reform efforts seek to move providers away from reliance on intercarrier compensation revenues.[1911] Nor are we persuaded that such an outcome is necessary to advance competitive or technological neutrality.[1912] As discussed above, our prospective regime for VoIP-PSTN intercarrier compensation is symmetrical, and thus avoids the marketplace distortions that could arise from an asymmetrical approach to compensation.[1913] In particular, the record does not demonstrate that our approach advantages in the aggregate providers relying on TDM networks relative to VoIP providers or vice versa,[1914] nor that it advantages in the aggregate certain IXCs relative to others.[1915] Further, to the extent that particular carriers historically have relied on access revenues to subsidize local services,[1916] the record is clear that many providers did not pay the same intercarrier compensation rates for VoIP traffic that would have applied to traditional telephone service traffic.[1917] Additionally, our

[1910] *See, e.g.*, Joint Letter at 4 (indicating support by the USTelecom, AT&T, CenturyLink, Fairpoint, Frontier, Verizon, Windstream, NTCA, OPASTCO, and WTA); NCTA July 29, 2011 *Ex Parte* Letter at 2 (noting NCTA's support for the VoIP proposal).

[1911] *See supra* Section XII.C.

[1912] *See, e.g.*, Bright House Section XV Comments at 4; CenturyLink Section XV Comments at 13; Frontier Section XV Comments at 9; NARUC Section XV Comments at 4-5; Pac-West Section XV Comments at 5; Cbeyond *et al.* Section XV Reply at 4.

[1913] *See supra* para. 942.

[1914] The transitional VoIP-PSTN intercarrier compensation regime we adopt here can reduce both the intercarrier compensation revenues and long distance and wireless costs associated with VoIP-PSTN traffic. The record does not quantify the net effect of the revenue reduction and cost savings either for VoIP providers and their wholesale carrier partners or for traditional LECs and their wholesale carrier partners. Thus, the record does not demonstrate that, by virtue of our transitional VoIP-PSTN intercarrier compensation regime, VoIP or TDM providers or VoIP or TDM technologies would be advantaged in the marketplace relative to one another.

[1915] The record does not indicate that particular IXCs currently carry a disproportionately large or small portion of VoIP-PSTN traffic today, nor that they would be precluded from competing to carry such traffic in the future. The record thus does not demonstrate a disparate financial impact on particular IXCs from the transitional VoIP-PSTN intercarrier compensation regime.

[1916] *See, e.g.*, Nebraska Rural Independent Companies Section XV Reply at 5. To the extent that high access rates historically have been used to subsidize artificially low rates for other services, we thus are not persuaded that, viewed in that light, access charges can be seen as "100 percent profit" as some contend. *See, e.g.*, Sprint July 29, 2011 *Ex Parte* Letter at 2. Given the flexibility the Commission has under section 201(b), *see, e.g.*, *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 91-213, Second Order on Reconsideration and Memorandum Opinion and *Order*, 12 FCC Rcd 16606, 16619–20, para. 44 (1997) (citing *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996)), we also disagree that transitional rates above incremental cost are inherently unjust and unreasonable under section 201(b), as some contend. *See, e.g.*, Google et al. Sept. 30, 2011 *Ex Parte* Letter, Attach. at 12-14.

[1917] *See supra* paras. 937-938 (discussing current disputes and alleged non-payment or under-payment of intercarrier compensation for VoIP traffic). *See also, e.g.*, XO Section XV Comments at 34; GVNW Section XV Comments at 4; NECA *et al.* Section XV Comments at 6; State Members of the USF Joint Board Comments at 21.

(continued...)

transitional VoIP-PSTN intercarrier compensation framework provides the opportunity for some revenues in conjunction with other appropriate recovery opportunities adopted as part of comprehensive intercarrier compensation and universal service reform.[1918]

949. Many of these commenters also argue that comparable uses of the network should be subject to comparable intercarrier compensation charges.[1919] We agree with that policy principle, but observe that the intercarrier compensation regime applicable to traditional telephone service—which they seek to apply to VoIP-PSTN traffic—is at odds with that policy. The pre-existing intercarrier compensation regime imposes significantly different charges for the same use of the network depending upon, among other things, the jurisdiction of the traffic at issue.[1920] A more uniform intercarrier compensation framework for all uses of the network will arise from the end-point of reform adopted in this Order. For purposes of the transition, we conclude that our approach best balances the relevant policy considerations.[1921]

950. We also are unpersuaded by concerns that an intercarrier compensation regime for VoIP-PSTN traffic could lead to further arbitrage or undermine the Commission-established transition adopted

(Continued from previous page) ———————————

Some VoIP providers state that they believe that full intercarrier compensation rates have applied to IP-originated or terminated traffic, *see, e.g.*, Cablevision-Charter Section XV Comments at 2 n.2; although, depending upon the nature of their wholesale agreements with long distance providers, VoIP providers might have limited direct knowledge of what compensation was paid for their traffic in some cases, *see, e.g.*, *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9644, para. 96 (discussing certain types of wholesale long distance agreements that incorporate flat, negotiated rates that do not vary with the intercarrier compensation charges actually paid by the IXC). Similarly, some LECs contend that full intercarrier compensation rates commonly have been paid for all VoIP traffic, *see, e.g.*, Apr. 6, 2011 Workshop Transcript, CC Docket No. 01-92 at 77-78 (filed Apr. 25, 2011); although many LECs contend that there has been no mechanism by which they could reliably identify which traffic was VoIP, *see, e.g.*, NECA *et al.* Section XV Comments at 5; PAETEC *et al.* Section XV Comments at 31-33; Windstream Section XV Comments at 7.

[1918] "As one investment analyst has recognized, if rural and mid-size LECs 'can achieve adequate new cost recovery,' then intercarrier compensation reform 'could still be helpful by reducing regulatory uncertainties and *ameliorating the downside* caused by already-eroding ICC revenues (principally access charges).'" Verizon Section XV Reply at 19-20 (quoting Rebecca Arbogast *et al.*, Stifel Nicolaus, *FCC Looks To Shift USF-ICC Reform Drive into Overdrive; August Order Eyed*, at 1 (Mar. 15, 2011) (emphasis added)).

[1919] *See, e.g.*, Cablevision-Charter Section XV Comments at 12; Missouri Small Telephone Company Group Section XV Comments at 3; Nebraska Rural Independent Companies Section XV Reply at 6-7, 9-10. Some commenters observe that in the *Access Charge Reform Order* the Commission cited ESPs' different usage of the local network than IXCs in supporting continued application of the ESP exemption and contend that, by contrast, VoIP traffic uses the network in a manner as other traffic that historically has been subject to intercarrier compensation charges. *See, e.g.*, Hawaiian Telcom Section XV Comments at 8-9. The framework we adopt for VoIP-PSTN traffic is transitional, however, and such traffic will pay most of the same rates as all other traffic in the second year of reform. *See supra* Section XII.C.

[1920] *See supra* Section X.

[1921] *See, e.g.*, *Southwestern Bell Tel. Co. et al. v. FCC*, 153 F.3d 523 at 542 (8th Cir. 1998) (upholding Commission intercarrier compensation rules and concluding that "the FCC has made a rational choice regarding the treatment of ISPs from a number of alternatives that are each imperfect. When an agency has gone to considerable lengths to amass information, sift through the record for pertinent facts, and reach a temporary conclusion, it has not acted arbitrarily or capriciously.").

for intercarrier compensation reform more broadly.[1922] An underlying assumption of those arguments is that the carriers delivering traffic for termination will be able to unilaterally determine the portion of their traffic to be subject to the VoIP-PSTN regime. As discussed in greater detail below, the implementation mechanisms for our approach protect against that outcome, both through protections that can be implemented in tariffs and through the option of negotiated agreements, subject to arbitration, regarding the portion of traffic subject to the VoIP-PSTN intercarrier compensation regime. We also permit LECs to include language in their tariffs to address the identification of VoIP-PSTN traffic, much as they do to identify the jurisdiction of traffic today.[1923]

951. States continue to play an important role under our prospective intercarrier compensation framework for VoIP-PSTN traffic, including arbitration of disputes between carriers seeking to enter alternative arrangements. However, we are not persuaded to leave regulation of intercarrier compensation for intrastate toll VoIP-PSTN traffic entirely to the states. Our transitional framework for VoIP-PSTN traffic reflects the fact that our comprehensive intercarrier compensation reforms are gradually moving away from jurisdictionalized intercarrier compensation charges that have led to arbitrage and marketplace distortions,[1924] and reflects the importance of a uniform, predictable transition away from historical intercarrier compensation regimes.[1925] At the same time, our universal service reforms continue to provide for an important state role, consistent with the basic underlying objectives of state commenters.[1926]

952. We also reject requests to immediately adopt a bill-and-keep methodology for VoIP traffic.[1927] Although this would clearly facilitate the Commission's transition away from existing intercarrier compensation regimes, we do not believe that the immediate adoption of bill-and-keep for all forms of VoIP-PSTN traffic appropriately balances other competing policy objectives. In particular, our approach to broader reform seeks a more measured transition away from carriers' reliance on intercarrier compensation as a significant revenue source.[1928] The immediate adoption of bill-and-keep for all VoIP-PSTN traffic would appear to be, in the aggregate, a more significant departure from the intercarrier compensation payments for VoIP traffic that have been made in the recent past.[1929] Our approach also

---

[1922] *See, e.g.*, Cablevision-Charter Section XV Comments at 5; PAETEC *et al.* Section XV Comments at 31-33; EarthLink Section XV Comments at 3; Bright House Section XV Reply at 5 & n.9; Cox Section XV Reply at 2-4; State Members July 14, 2011 *Ex Parte* Letter at 10.

[1923] *See infra* Section XIV.C.2.c.

[1924] In light of these concerns with intercarrier compensation charges that vary by jurisdiction, we thus disagree that this approach is inherently inconsistent with the Commission's treatment of VoIP in other contexts. *See, e.g.*, State Members July 14, 2011 *Ex Parte* Letter at 10.

[1925] *See supra* Section XII.C.

[1926] *See supra* Sections VII-IX. *See also*, Letter from James Bradford Ramsay, General Counsel, NARUC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 96-45, 01-92 at 2 (filed Sept. 22, 2011); *see generally* NARUC Legislative Task Force Report on Federalism and Telecom, July 2005, http://www.dps.state.ny.us/federalism_s0705.pdf.

[1927] *See, e.g.*, CTIA Section XV Comments at 11; Google Section XV Comments at 8; MegaPath-Covad Section XV Comments at 5-8; Sprint Section XV Comments at 6-7; T-Mobile Section XV Comments at 9-12; VON Section XV Comments at 3-5; Vonage Section XV Comments at 3-13.

[1928] *See supra* Section XII.C.

[1929] *See supra* note 1917.

helps limit the initial burden that the intercarrier compensation reform recovery mechanism places on the Universal Service Fund.[1930]

953. Similarly, we conclude that other proposed VoIP-specific approaches to intercarrier compensation do not advance the relevant policy objectives as well as our approach. For example, some of the proposed approaches likely would be almost as significant a departure from the intercarrier compensation payments for VoIP traffic that have been made in the recent past as a bill-and-keep approach.[1931] Nor are such approaches compelled by section 706 of the 1996 Act, as some contend.[1932] Although we seek to ensure that our policies do not hinder the ongoing migration to all-IP networks, and take many actions in this Order to advance the goals of section 706, we also weigh the need to transition carriers away from reliance on intercarrier compensation revenues, which potentially help support some providers' deployment of broadband networks today. Other approaches, which would bring VoIP traffic within the intercarrier compensation regime at a future point in the glide path,[1933] would not increase marketplace certainty in the near term to the same extent as our framework. In sum, we believe that our transitional framework for VoIP-PSTN intercarrier compensation strikes the best balance among the relevant policy goals during the reform transition, while accounting for the flaws in the preexisting intercarrier compensation regimes and the overall direction of comprehensive intercarrier compensation reform.

b. Legal Authority

954. *Authority To Address VoIP-PSTN Traffic Under Section 251(b)(5).* Although the Commission has not classified interconnected VoIP services or similar one-way services[1934] as "telecommunications services" or "information services," VoIP-PSTN traffic nevertheless can be encompassed by section 251(b)(5).[1935] As discussed in greater detail above,[1936] section 251(b)(5) includes "the transport and termination of all telecommunications exchanged with LECs" with the exception of "traffic encompassed by section 251(g) . . . except to the extent that the Commission acts to bring that traffic within its scope."[1937] The Commission previously has recognized that interconnected VoIP

[1930] *See supra* Section XIII.

[1931] *See, e.g.*, Verizon Section XV Comments at 15-19. Similarly, approaches that would adopt reciprocal compensation charges for VoIP Traffic, *see, e.g.*, Comcast Section XV Comments at 4, 13-14; XO Section XV Comments at 14, 19, 22-24, effectively could have as significant a result for many carriers, given the number of carriers exchanging reciprocal compensation traffic at $0.0007 today in light of the ISP-bound traffic rules, *see 2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6486-89, paras. 23-29.

[1932] *See, e.g.*, Sprint July 29, 2011 *Ex Parte* Letter at 1-3 (arguing that imposing access charges on VoIP traffic would be inconsistent with section 706); Google *et al.* Sept. 30, 2011 *Ex Parte* Letter, Attach. at 9-11 (same). *See also, e.g.*, Letter from Richard S. Whitt, Director and Managing Counsel, Telecom and Media Policy, Google, *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-92 *et al.* at 2-6 (filed Oct. 18, 2011) (Google Oct. 28, 2011 *Ex Parte* Letter) (contending that requiring intercarrier compensation payment for VoIP traffic could negatively impact certain providers' business models).

[1933] Public Knowledge *USF/ICC Transformation NPRM* Comments at 25 n.62.

[1934] *See supra* Section XIV.C.1.

[1935] We thus are not persuaded by claims that the prospective VoIP-PSTN intercarrier compensation regime must categorically exclude traffic from VoIP services that are claimed to be information services. *See, e.g..*, Google Oct. 28, 2011 *Ex Parte* Letter at 6-7.

[1936] *See supra* Section XII.A.2.

[1937] *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6482-83, paras. 15-16.

providers are providers of telecommunications.[1938] Moreover, the Commission has previously concluded that interconnected VoIP services involve "transmission of [voice] by aid of wire, cable, or other like connection" and/or "transmission by radio,"[1939] and went on to conclude that "[t]he telecommunications carriers involved in originating or terminating a [VoIP] communication via the PSTN are by definition offering 'telecommunications.'"[1940] Further, although classification questions remain regarding retail VoIP services, commenters observe that the exchange of VoIP-PSTN traffic that is relevant to our intercarrier compensation regulations typically occurs between two telecommunications carriers, one or both of which are wholesale carrier partners of retail VoIP service providers.[1941] Nor does anything in the record persuade us that a different conclusion is warranted in the context of other VoIP-PSTN traffic.[1942]

955. *Authority To Adopt Transitional Rates for VoIP-PSTN Traffic.* The legal authority that enables us to specify transitional rates for comprehensive intercarrier compensation reform also enables us to adopt our transitional VoIP-PSTN intercarrier compensation framework pending the transition to bill-and-keep.[1943] For one, the Commission's pre-existing regimes for establishing reciprocal compensation rates for section 251(b)(5) traffic have been upheld as lawful,[1944] and can be applied to non-toll VoIP-PSTN traffic as provided by our transitional intercarrier compensation rules. We also have authority to adopt the transitional framework for toll VoIP-PSTN traffic based on our rulemaking authority to implement section 251(b)(5).[1945] As discussed above,[1946] interpreting our rulemaking authority in this manner is consistent with court decisions recognizing that avoiding "market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule."[1947]

[1938] *Interim Universal Service Contribution Methodology Order*, 21 FCC Rcd at 7539-40, para. 41.

[1939] *Id.* (quoting *VoIP 911 Order*, 20 FCC Rcd at 10261-62, para. 28).

[1940] *Id.*

[1941] *See, e.g.*, Cablevision-Charter Section XV Comments at 7-8; CenturyLink Section XV Comments at 5-6; PAETEC *et al.* Section XV Comments at 37; Time Warner Cable Section XV Comments at 8; AT&T Section XV Reply at 23; Bright House Section XV Reply at 3 n.6. Whether the service the carrier is providing as an input to the retail VoIP service is an interexchange service or exchange access depends upon the particular facts. *See, e.g.*, *AT&T IP-in-the-Middle Order*, 19 FCC Rcd at 7469-70, para. 19 n.80 ("Depending on the nature of the traffic, carriers such as commercial mobile radio service (CMRS) providers, incumbent LECs, and competitive LECs may qualify as interexchange carriers for purposes of [the access charge] rule.").

[1942] Because our prospective VoIP-PSTN intercarrier compensation rules typically involves traffic exchanged between carriers, and because intercarrier compensation disputes have tended to involve all forms of VoIP traffic, we are not persuaded that the Commission should draw additional distinctions among traffic associated with different types of VoIP services, as some commenters recommend. *See, e.g.*, Google et al. Sept. 30, 2011 *Ex Parte* Letter, Attach. at 4-6 (arguing that there is significant variability among VoIP services' features and functions, and that intercarrier compensation should not apply to traffic associated with such services for example because of historical policies that information services generally should remain unregulated and the provisions of section 230 regarding the preservation of "the Internet and other interactive computer services, unfettered by Federal or State regulation").

[1943] *See supra* Section XII.A.2.

[1944] *See, e.g., AT&T v. Iowa Utilities Board*, 525 U.S. 382, 384-85 (1999) (upholding the Commission's authority to adopt a pricing methodology for section 251(b)(5) traffic); *Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010) (upholding the Commission's reciprocal compensation regime for ISP-bound traffic).

[1945] *See supra* Section XII.A.2.

[1946] *Id.*.

[1947] *Rural Cellular Ass'n v. FCC,* 588 F.3d 1095, 1106 (D.C. Cir. 2009) (quoting *Competitive Telecomm's Ass'n v. FCC,* 309 F.3d 8, 14 (D.C. Cir. 2002)).

Sections 201 and 332 provide additional legal authority specifically for interstate traffic and all traffic exchanged with CMRS providers.[1948]

956. *Application of Section 251(g).* Additionally, as described above,[1949] section 251(g) supports our view that the Commission has authority to adopt transitional intercarrier compensation rules, preserving the access charge regimes that pre-dated the 1996 Act "until [they] are explicitly superseded by regulations *prescribed by the Commission*."[1950] We reject the claims of some commenters that VoIP-PSTN traffic did not exist prior to the 1996 Act, and thus cannot be part of the access charge regimes "grandfathered" by section 251(g).[1951] This argument flows from a mistaken interpretation of section 251(g). The essential question under section 251(g) is not whether a particular service, or traffic involving a particular transmission protocol,[1952] existed prior to the 1996 Act.[1953] Rather, the question is whether there was a "pre-Act obligation relating to intercarrier compensation for" particular traffic exchanged between a LEC and "'interexchange carriers and information service providers.'"[1954]

957. *Pre-1996 Act Obligations.* Regardless of whether particular VoIP services are telecommunications services or information services, there are pre-1996 Act obligations regarding LECs'

[1948] *See supra* Section XII.A.2.

[1949] *See supra* paras. 763-766.

[1950] 47 U.S.C. § 251(g) (emphasis added).

[1951] *See, e.g.*, MegaPath-Covad Section XV Comments at 7; Sprint Section XV Comments at 5-6.

[1952] VoIP traffic existed prior to the 1996 Act, although the record here does not reveal whether LECs were exchanging IP-originated or IP-terminated VoIP traffic at that time. *See, e.g.*, Consolidated Section XV Reply at 9 (noting a 1996 American Carrier's Telecommunication Association ("ACTA") petition seeking Commission classification of VoIP telephony as a telecommunications service, which included a news report dated before the 1996 Act was enacted that "indicat[ed] that VoIP telephony had at that time been available for over a year"). Because we otherwise reject the claim that intercarrier compensation for VoIP-PSTN traffic is categorically excluded from section 251(g), we need not, and do not, consider further the nature and extent of VoIP traffic that existed prior to the 1996 Act.

[1953] Some commenters cite certain federal district court cases that reached a different conclusion than our statutory analysis above. *See, e.g.*, MegaPath-Covad Section XV Comments at 7 n. 15 (citing *PAETEC Commc'ns, Inc. v. CommPartners*, LLC, CIV-A No. 08-0397, 2010 WL 1767193, at *3 (D.D.C. Feb. 18, 2010); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1080 (E.D. Mo. 2006)). However, as other commenters observe, these outcomes conflict with those reached in other decisions. *See, e.g.*, Cablevision-Charter Section XV Reply at 12-13 n.37 (citing state commission decisions). *See also supra* para. 937 (discussing different decisions by state commissions and courts). In any event, we are not bound by those prior decisions, and find our statutory analysis above to be most appropriate.

[1954] *WorldCom v. FCC*, 288 F.3d 429, 433-34 (D.C. Cir. 2002) (citing 47 U.S.C. § 251(g)). Indeed, the contrary interpretation would suggest that a wide range of traffic would have fallen outside the scope of access charges, and have been exclusively subject to section 251(b)(5) today. *See, e.g.*, NATIONAL BROADBAND PLAN at 76 (discussing wireless technologies introduced since 1997); *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5698, para. 63 n.180 (2007) (observing that carriers are migrating to Multiprotocol Label Switching (MPLS)). *Cf.* Cablevision-Charter Section XV Reply at 13-14 ("No one could seriously contend, for example, that LECs upgrading their circuit-switches to soft switches subsequent to the 1996 Act somehow lost their right to assess access charges. Indeed, the Commission has made clear that the use of VoIP technology in and of itself does not exempt a service from access charges, concluding that AT&T's IP-in-the-middle service "'is subject to interstate access charges.'"); GCI 2008 Comments at 14 ("GCI has provided telecommunications services under tariff using a combination of its own copper and fiber facilities, UNEs, and resale. More recently, GCI has also started offering the exact same tariffed services over its cable platform.").

compensation for the provision of exchange access to an IXC or an information service provider.[1955] Indeed, the Commission has already found that toll telecommunications services transmitted (although not originated or terminated) in IP were subject to the access charge regime,[1956] and the same would be true to the extent that telecommunications services originated or terminated in IP.[1957] Similarly, to the extent that interexchange VoIP services are transmitted to the LEC directly from an information service provider, such traffic is subject to pre-1996 Act obligations regarding "exchange access," although the access charges imposed on information service providers were different from those paid by IXCs.[1958] Specifically, under the ESP exemption,[1959] rather than paying intercarrier access charges, information service providers were permitted to purchase access to the exchange as end users, either by purchasing special access services or "pay[ing] local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices."[1960] But although the nature of the charge is different from the access charges paid by IXCs, the Commission has always recognized that information-service providers providing interexchange services were obtaining exchange access from the LECs.[1961] Accordingly, because they were subject to these exchange access charges, interexchange

---

[1955] Interexchange VoIP-PSTN traffic is subject to the access regime regardless of whether the underlying communication contained information-service elements.

[1956] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457, 7466-70, paras. 14-19 (2004) (*IP-in-the-Middle Order*); *Prepaid Calling Card Order*, 21 FCC Rcd at 7300, para. 27.

[1957] As commenters observe, those access charge obligations did not depend upon the transmission protocol associated with the telecommunications service. *See, e.g.*, Cablevision-Charter Section XV Reply at 13-14; ITTA Section XV Reply at 410; GCI 2008 Comments at 13-14. Under Commission precedent, the presence of protocol processing in a service certainly could be relevant to determining whether it is a telecommunications service or an information service. *See, e.g.*, 47 C.F.R. § 64.702(a) (defining enhanced services).

[1958] 47 U.S.C. § 251(g). *See supra* paras. 763-766.

[1959] In developing the access charge regime, the Commission established a so-called "ESP exemption" because it recognized that certain "users who employ exchange service for jurisdictionally interstate communications, including enhanced service providers (ESPs), had "been paying the generally much lower business service rates" and "would experience severe rate impacts were we immediately to assess carrier access charges up on them." *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Memorandum Opinion and Order, 97 FCC 2d 682, 715, para. 83 (1983) (*First Reconsideration of 1983 Access Charge Reform Order*); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2631, para. 2 n.8 (1988) (*ESP Exemption Order*).

[1960] *ESP Exemption Order*, 3 FCC Rcd at 2631, para. 2 n.8.

[1961] *See, e.g., Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates*, WC Docket No. 03-228, CC Docket Nos. 96-149, 98-141, 96-149, 01-337, Report and Order, Memorandum Opinion and Order, 19 FCC Rcd 5102, 5111-12, para. 17 (2004); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Remand, 15 FCC Rcd 385, 406, para. 45 (1999), *aff'd in part and rev'd in part on other grounds. WorldCom v. FCC*, 246 F.3d 690 (D.C. Cir. 2001); *Enhanced Telemanagement, Inc. v. Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company*, File Nos. E-89-183, E-89-184, 11 FCC Rcd 19669, 19670-71, para. 3 (1996). Note that access services include both carrier's carrier access charges and the subscriber line charge. *See, e.g., Petitions of Qwest Corporation for Forbearance Pursuant To 47 U.S.C. § 160(C) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97, Memorandum Opinion and Order, 23 FCC Rcd 11729, 11747-48, para. 25 (2008). We note that the Commission at times has used the term "access charges" colloquially as synonymous with carrier's carrier access charges, notwithstanding the fact that access charges actually encompass a broader category of charges. *Compare, e.g., MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241, 249-50, para. 23 (1983) ("Terms such as access, access service and access charges will be used in this *Third* (continued...)

information service traffic was subject to the over-arching Commission rules governing exchange access prior to the 1996 Act, and therefore subject to the grandfathering provision of section 251(g).

958. The D.C. Circuit's *WorldCom* decision, cited by some commenters, does not compel a different result.[1962] In *WorldCom*, the court considered whether dial-up, ISP-bound traffic was covered by section 251(g)'s grandfathering provision. Consistent with the language of section 251(g), the court focused on whether there was a "pre-Act obligation relating to intercarrier compensation for ISP-bound traffic" and found it "uncontested—and the Commission declared in the Initial Order"—that there was not.[1963] Although the court also stated that "[t]he best the Commission can do" in indentifying a pre-1996 Act obligation "is to point to pre-existing LEC obligations to provide interstate access for ISPs,"[1964] the discussion in the initial *ISP-Bound Traffic Order* cited by the court emphasized the uncertainty at that time regarding the regulatory classification of the functions provided by the carrier serving the ISP—i.e., whether it was providing local service, interexchange service, or exchange access.[1965] As the D.C. Circuit ultimately observed, the fact that the carrier serving the ISP was acting as a LEC—rather than an interexchange carrier or information service provider—would be dispositive that compensation for that traffic exchange could not be encompassed by section 251(g).[1966] Here, by contrast, there is no evidence that the exchange of toll VoIP-PSTN traffic inherently involves the exchange of traffic between two LECs. Moreover, we note that to the extent VoIP-PSTN traffic is not "toll" traffic, it is subject to the preexisting reciprocal compensation regime under section 251(b)(5) rather than the transitional framework for toll VoIP-PSTN traffic that we adopt in this Order.

959. *Other Proposed Approaches.* Based on the present record, and given the framework we adopt, we do not rely on the contention that the Commission has legal authority to adopt this regime because all VoIP-PSTN traffic should be treated as interstate.[1967] Some commenters contend that, under the analysis of the *Vonage Order*, VoIP services are subject to exclusive federal jurisdiction.[1968] As a

(Continued from previous page) ———————————

Report and Order to encompass both end user and carrier's carrier charges.") *with, e.g., Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4688-89, para. 6 n.13 ("Although the access charge regime adopted in 1983 and contained in the Commission's Part 69 access charge rules includes charges that LECs impose on their subscribers, in this item we generally use the term 'access charges' to mean charges imposed by a LEC on another carrier").

[1962] *See, e.g.*, Sprint Section XV Comments at 5-6.

[1963] *WorldCom*, 288 F.3d at 433-34.

[1964] *Id.* Despite mentioning the ESP exemption in the *ISP Remand Order*, the Commission did not rely on those exchange access regulations, including compensation obligations, that existed under that pre-1996 Act framework. *ISP Remand Order*, 16 FCC Rcd at 9164, paras. 27-28. Rather, it held that the exchange of such traffic was "information access" and encompassed by section 251(g) on that basis. *ISP Remand Order*, 16 FCC Rcd at 9171, para. 44.

[1965] *Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 at 3695, para. 9 (1999).

[1966] *WorldCom*, 288 F.3d at 433-34. *See also, e.g.*, Consolidated Section XV Reply at 8.

[1967] *See, e.g.*, ABC Plan, Attach. 5 at 18 (proposing that the Commission find that "all VoIP traffic . . . is inseverable and, therefore, interstate for jurisdictional purposes"). We do not prejudge how services might develop in the future, and how this analysis might apply at that time. At the same time, nothing in this Order alters the *status quo* with respect to the jurisdictional treatment of VoIP traffic or services under existing precedent.

[1968] *See, e.g.*, XO Section XV Comments at 14-18; Verizon Section XV Comments at 19-31, Verizon Section XV Reply at 21.

threshold matter, the *Vonage Order* addressed a retail VoIP service.[1969] By contrast, VoIP-PSTN intercarrier compensation typically involves the exchange of traffic between two carriers, one (or both) of which are providing wholesale inputs to a retail VoIP service—not the retail VoIP service itself.[1970] In addition, under the framework adopted here, most default rates actually paid for toll VoIP-PSTN traffic—equal to interstate access rates—will be the same regardless of whether the VoIP-PSTN toll traffic were considered to be solely interstate or both interstate and intrastate. Commenters likewise contend that it is possible to make the distinctions necessary to implement such a framework, whether directly in some cases[1971] or through the use of proxies or factors or the like.[1972]

[1969] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22406-08, paras. 4-9 (2004) (*Vonage Order*). Nothing in this Order impacts the holding of the *Vonage Order*. Nor does anything in this item impact the holding of the *Kansas/Nebraska Contribution Order*. *See Universal Service Contribution Methodology; Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues*, WC Docket No. 06-122, Declaratory Ruling, 25 FCC Rcd 15651, 15652-53, para. 5 (2010) (*Kansas/Nebraska Contribution Order*). The *Kansas/Nebraska Contribution Order* performed the relevant preemption analysis for the limited purposes of evaluating state universal service contribution obligations for nomadic interconnected VoIP providers and, based on that analysis and considering that the Commission had already adopted a safe harbor assuming [64.9 percent] of VoIP revenues were intrastate for purposes of contributions to the federal universal service fund, concluded that they would not be preempted in certain circumstances. *See generally Kansas/Nebraska Contribution Order*, 25 FCC Rcd 15651.

[1970] *See supra* note 1941. For example, as cable operators explain, their retail VoIP provider partners with a LEC for the exchange of traffic with other carriers. *See, e.g.*, Cablevision-Charter Section XV Comments at 7-8; Time Warner Cable Section XV Comments at 7-8; Bright House Section XV Reply at 3 n.6; Letter from Mary McManus, Senior Director, FCC and Regulatory Policy, Comcast, *et al.*, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 07-135, GN Docket No. 09-51 at 2 (filed Oct. 24, 2011) (Comcast *et al.* Oct. 24, 2011 *Ex Parte* Letter).

[1971] Some commenters contend that the challenges in identifying the jurisdiction of VoIP traffic – particularly on a call-by-call basis – arise to a greater extent for nomadic VoIP, while compliance with jurisdictionalized intercarrier compensation charges is comparatively more straightforward for certain facilities-based VoIP services. *See, e.g.*, Cbeyond *et al.* Section XV Reply at 9-10; Rural LEC Section XV Group Section XV Comments at 4-5; Bright House *August 3 PN* Comments at 8.

[1972] There appears to be broad support for the principle that VoIP providers and their wholesale carrier partners can comply with an intercarrier compensation regime with charges that differ at least to some degree based on where the calls originate and terminate. *See, e.g.*, ABC Plan, Attach. 1 at 10 (proposing intercarrier compensation rules for VoIP traffic that impose differing charges depending upon whether the traffic is toll traffic or traditional reciprocal compensation traffic). Even beyond that, a number of commenters contend that factors or traffic studies have proved workable in addressing the jurisdiction of other traffic and similar approaches can be used for VoIP-PSTN traffic as well. *See, e.g.*, AT&T Section XV Reply at 20; Cbeyond *et al.* Reply at 10; Nebraska Rural Independent Companies Section XV Reply at 8; Pennsylvania PUC *August 3 PN* Comments at 22-23. We also note, for example, that "[t]he Commission has long endorsed the use of [percentage of interstate usage (PIU) factors] to determine the jurisdictional nature of traffic for access charge purposes." *Prepaid Calling Card Order*, 21 FCC Rcd at 7302, para. 32. We do not adopt a jurisdictional safe harbor based on the safe harbor for interconnected VoIP providers' universal service contributions, *see, e.g.*, Cbeyond et al. *August 3 PN* Comments at 15, because that is based on a percentage of revenues, rather than a percentage of traffic, and also does not further differentiate between intrastate toll traffic and other intrastate traffic. Nor do we otherwise have data to justify setting an industry-wide jurisdictional safe harbor.

c. Implementation

960. As discussed below, carriers may tariff charges at rates equal to interstate access rates for toll VoIP-PSTN traffic in federal or state tariffs but remain free to negotiate interconnection agreements specifying alternative compensation for that traffic instead.[1973] Other VoIP-PSTN traffic will be subject to otherwise-applicable reciprocal compensation rates. Because telephone numbers and other call detail information do not always reliably establish the geographic end-points of a call, we do not mandate their use. However, to address concerns about identifying VoIP-PSTN traffic, we allow LECs to include tariff language addressing that issue, much as they do to address jurisdiction questions today.

961. *Role of Tariffs*. During the transition, we permit LECs to tariff reciprocal compensation charges for toll VoIP-PSTN traffic equal to the level of interstate access rates.[1974] Although we are addressing intercarrier compensation for all VoIP-PSTN traffic under the section 251(b)(5) framework, we are doing so as part of an overall transition from current intercarrier compensation regimes—which rely extensively on tariffing specifically with respect to access charges—and a new framework more amenable to negotiated intercarrier compensation arrangements. We therefore permit LECs to file tariffs that provide that, in the absence of an interconnection agreement,[1975] toll VoIP-PSTN traffic will be subject to charges not more than originating[1976] and terminating interstate access rates. This prospective regime thus facilitates the benefits that can arise from negotiated arrangements[1977] without sacrificing the

---

[1973] Consistent with the ABC Plan's proposal, nothing in our VoIP-PSTN intercarrier compensation framework alters or supersedes the reciprocal compensation rules for CMRS providers, including the intraMTA rule. ABC Plan, Attach. 1 at 10 n.6. *See also* Section XV.D.

[1974] CMRS providers currently are subject to detariffing, and nothing in our intercarrier compensation framework VoIP-PSTN traffic disrupts that regulatory approach. *See Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, Declaratory Ruling, 17 FCC Rcd 13192, 13198, para. 12 (2002) (*Sprint/AT&T Declaratory Ruling*), *petitions for review dismissed, AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003). Under our permissive tariffing regime, providers likewise are free not to file federal and/or state tariffs for VoIP-PSTN traffic, and instead seek compensation solely through interconnection agreements (or, if they wish, to forgo such compensation).

[1975] We use the term "interconnection agreement" broadly in this context to encompass agreements that might not address all aspect of section 251's requirements beyond intercarrier compensation, and regardless of the terminology that the parties use to describe the arrangement. *See, e.g.*, Texas Statewide Telephone Cooperative Aug. 19, 2002 Reply at 4 (describing a "template Transport and Termination Agreement . . . developed at the direction of the Texas Public Utility Commission" that was an "abbreviated 251(b)(5) transport and termination agreement").

[1976] As the Commission has observed, "section 251(b)(5) refers only to transport and termination of telecommunications, not to origination." *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4713-14, para. 517. The Commission also has held that origination charges are inconsistent with section 251(b)(5). *See, e.g., Local Competition First Report and Order*, 11 FCC Rcd at 16016, para. 1042 ("Section 251(b)(5) specifies that LECs and interconnecting carriers shall compensate one another for termination of traffic on a reciprocal basis. This section does not address charges payable to a carrier that originates traffic. We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic."). Although we consequently do not believe that a permanent regime for section 251(b)(5) traffic could include origination charges, on a transitional basis we allow the imposition of originating access charges in this context, subject to the phase-down and elimination of those charges pursuant to a transition to be specified in response to the FNPRM. *See infra* Section XVII.M. *See also USF/ICC Transformation NPRM*, 26 FCC Rcd at 4713-14, para. 517.

[1977] Both the Commission and commenters previously have considered deviating from a pure tariffing regime in favor of more expansive use of negotiated arrangements as part of intercarrier compensation reform. *See, e.g.*, (continued...)

revenue predictability traditionally associated with tariffing regimes.[1978] For interstate toll VoIP-PSTN traffic, the relevant language will be included in a tariff filed with the Commission, and for intrastate toll VoIP-PSTN traffic, the rates may be included in a state tariff.[1979] In this regard, we note that the terms of an applicable tariff would govern the process for disputing charges.[1980]

962. Contrary to some proposals, however, we do not require the use of particular call detail information to dispositively distinguish toll VoIP-PSTN traffic from other VoIP-PSTN traffic, given the recognized limitations of such information.[1981] For example, the Commission has recognized that telephone numbers do not always reflect the actual geographic end points of a call.[1982] Further, although our phantom traffic rules are designed to ensure the transmission of accurate information that can help enable proper billing of intercarrier compensation, standing alone, those rules do not ensure the transmission of sufficient information to determine the jurisdiction of calls in all instances.[1983] Rather, consistent with the tariffing regime for access charges discussed above, carriers today supplement call detail information as appropriate with the use of jurisdictional factors or the like when the jurisdiction of traffic cannot otherwise be determined.[1984] We find this approach appropriate here, as well.

963. We do, however, clarify the approach to identifying VoIP-PSTN traffic for purposes of complying with this transitional intercarrier compensation regime. Although intercarrier compensation rates for VoIP-PSTN traffic during the transition will differ from other rates for only a limited time, we recognize commenters' concerns regarding the mechanism to distinguish VoIP-PSTN traffic, and thus

(Continued from previous page)

Intercarrier Compensation NPRM, 16 FCC Rcd at 9656-57, para. 130. *See also, e.g.*, AT&T *USF/ICC Transformation NPRM* Comments at 30-31 (advocating detariffing of access charges); AT&T Section XV Comments at 13-15; Verizon *Intercarrier Compensation FNPRM* Comments at 6-14.

[1978] *See, e.g.*, XO Section XV Comments at 32 (arguing that the Commission should ensure that terminating carriers have the right to assess intercarrier compensation charges for VoIP-PSTN traffic "even in the absence of an agreement so that VoIP providers cannot refuse to negotiate a reciprocal compensation agreement to avoid paying any rate for termination of their traffic"); NECA *et al.* Section XV Reply at 6 (arguing that small carriers can have difficulty getting larger carriers to come to the negotiating table at all).

[1979] We note that the Commission has, in the past, regulated services that were offered through state tariffs. *See, e.g.*, *Wisconsin Public Service Commission*, 17 FCC Rcd 2051, 2060-71, paras. 31-65 (2002) (regulating BOCs' state-tariffed payphone access line rates); *Open Network Architecture Plans of the Bell Operating Companies*, 4 FCC Rcd 1, 162-71, paras. 309-25 (1988) (regulating state-tariffed ONA services in various respects).

[1980] *See supra* para. 700.

[1981] *See, e.g.*, ABC Plan, Attach. 1 at 10; Joint Letter at 3.

[1982] *See, e.g., Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123 & CC Docket No. 92-105, Order, 23 FCC Rcd 5707, 5712-13, paras. 9-10 (CGB Oct. 9, 2007); ABC Plan, Attach. 5 at 22. *See also, e.g.*, CRUSIR *August 3 PN* Comments at 20-21; Sprint *August 3 PN* Comments at 17; CenturyLink Section XV Comments at 23; CTIA Section XV Comments at 9-10; TEXALTEL Section XV Comments at 2; Verizon Section XV Comments at 24; ZipDX Section XV Comments at 4.

[1983] *See supra* Section XI.B.

[1984] *See supra* para.959. *See also, e.g.*, Level 3 *August 3 PN* Comments at 25; NECA *et al. August 3 PN* Comments at 50; Bright House Section XV Comments at 5 n.7; CenturyLink Section XV Comments at 23; CTIA Section XV Comments at 10; XO Section XV Comments at 33; Letter from Charon Phillips, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 1-2 (filed Mar. 13, 2007).

sought specific comment on that issue.[1985] In response, a number of commenters[1986] argued that the industry should be permitted to "work cooperatively"[1987] to address this issue, recognizing that "[o]ver the years, carriers have developed reasonable methods for distinguishing between calls for billing purposes . . . and can be expected to do so here."[1988] We agree that, "to help manage the transition" LECs should be permitted to incorporate specific tariff provisions in their intrastate tariffs[1989] that "could, for example, require carriers delivering traffic for termination to identify the percentage of traffic that is" subject to the transitional VoIP-PSTN intercarrier compensation regime "and to support those figures with traffic studies or other reasonable analyses that are subject to audit."[1990] Just as such a tariffing framework already is used to address jurisdiction of traffic,[1991] such an approach is a reasonable tool (in addition to information the terminating LEC has about VoIP customers it is serving) to identify the relevant traffic subject to the VoIP-PSTN intercarrier compensation regime. In addition, one commenter noted the potential to rely on interconnected VoIP subscriber and wireline line count data from Form 477 to develop a safe harbor.[1992] Thus, as an alternative, we permit the LEC instead to specify in its intrastate tariff that the default percentage of traffic subject to the VoIP-PSTN framework is equal to the percentage of VoIP subscribers in the state based on the Local Competition Report, as released periodically,[1993]

[1985] *See August 3 PN* at 17.

[1986] *See, e.g.*, AT&T *et al. August 3 PN* Comments at 36; Comcast *August 3 PN* Comments at 20; NECA *et al. August 3 PN* Comments at 50-51; XO *August 3 PN* Comments at 10.

[1987] AT&T et al. *August 3 PN* Comments at 36.

[1988] NECA et al. *August 3 PN* Comments at 50. *See also* Vonage Section XV Reply at 14 (observing that although "[t]o date, there has not been a business, regulatory or other reason to justify developing a universal method for identifying VoIP traffic," the industry likely will be able to identify "viable solutions that would make the identification of VoIP traffic relatively easy without requiring onerous or costly billing system changes" once it undertakes to do so).

[1989] As Comcast observes, the only context where there is a default VoIP-specific intercarrier compensation rate is with respect to intrastate toll VoIP-PSTN traffic. Comcast *August 3 PN* Comments at 20 n.57.

[1990] AT&T et al. *August 3 PN* Comments at 36. *See also, e.g.*, XO Section XV Comments at 33 (observing that factors could be used to indicate the percentage of terminated traffic that is VoIP, much as is done in the industry for jurisdictional purposes today); Verizon Section XV Reply at 24 (citing "standard and reliable traffic factoring methods already used today for intercarrier compensation billing purposes" as well as "certifications" and "audits"); Comcast Section XV Reply at 11 (providers could certify the percentage of traffic that is VoIP, subject to auditing); XO *August 3 PN* Comments at 10 (asserting that "the Commission must ensure that LECs have the right to audit any factors or percentages that are self-provided by carriers delivering VoIP traffic to ensure they are accurate").

[1991] As the Commission has observed, "in their tariffs, LECs require IXCs to report PIUs to identify the percentage of interstate traffic on interconnection trunks." *Prepaid Calling Card Order*, 21 FCC Rcd at 7306, para. 32; *see also* Comcast *August 3 PN* Comments at 20. To the extent that the approach we adopt would not identify all variations in traffic in real time, *see* Cox Section XV Reply at 3-4, the record does not demonstrate this to be a more significant issue in the case of identification of VoIP-PSTN traffic than it would be with respect to the identification of the jurisdiction of traffic for which such approaches are used today.

[1992] Cox *August 3 PN* Comments at 7 ("Form 477 requires filers to identify their voice service lines by technology, and the proportion of voice service lines served by a particular technology is a good proxy for the proportion of long distance minutes served by that technology.").

[1993] In particular, under this approach, the default percentage of VoIP-PSTN traffic in a state would be the total number of incumbent LEC and non-incumbent LEC VoIP subscriptions in a state divided by the sum of those reported VoIP subscriptions plus incumbent LEC and non-incumbent LEC switched access lines. *See, e.g.*, IATD, Wir. Comp. Bur., *Local Telephone Competition: Status as of December 31, 2010*, Table 8 (rel. Oct. 2011). *See also* (continued...)

unless rebutted by the other carrier.[1994] Further, although we do not mandate other approaches as part of our tariffing regime, individual providers remain free to rely on signaling or call detail information,[1995] or other measures, to the extent that they enter alternative compensation arrangements through interconnection agreements.[1996] In particular, contrary to some suggestions, we do not require filing of certifications with the Commission regarding carriers' reported VoIP-PSTN traffic.[1997] Such certifications would be required from not only IXCs but also originating and terminating providers nationwide, even though these issues may be of little or no practical concern in states with intrastate access rates that already are at or near interstate rates. Given the likely significant overbreadth in the burden that would impose, we decline to adopt such a requirement.

964. Although we will allow tariffs during the transition to bill-and-keep, we reaffirm our decision in the *T-Mobile Order* that good-faith negotiations generally are preferable to tariffing as a means of implementing carriers' compensation obligations.[1998] In the *T-Mobile Order*, we addressed wireless termination tariffs that applied only in the absence of interconnection agreements.[1999] The Commission found that such tariffs were not precluded by the Act or preexisting Commission rules, but prohibited the use of such tariffs on a going-forward basis,[2000] recognizing that the section 251 and 252 framework of the Act, which encompassed the traffic at issue there, reflected a clear preference for negotiated arrangements.[2001] Nonetheless, under the circumstances here, we do not believe that the policies underlying the prohibition of wireless termination tariffs for non-access traffic in the *T-Mobile Order* requires us to prohibit use of tariffs for toll VoIP-PSTN traffic during the transition. Although we likewise are moving to facilitate negotiated arrangements for intercarrier compensation more broadly,

(Continued from previous page) ———————————

Cox *August 3 PN* Comments at 7 (noting the availability of state-specific data). In the event that data are not available for the relevant state, the LEC may instead use the nationwide data.

[1994] Although some commenters assert that there is significant variability in the volume of VoIP-PSTN traffic carried provider-to-provider, *see, e.g.*, AT&T *et al. August 3 PN* Comments at 36; XO *August 3 PN* Comments at 10, we observe that this "safe harbor" is optional on the part of the LEC imposing the charges, and also can be rebutted by the other carrier. In addition, the magnitude of the variability could itself make rebuttal easier, at least in some cases. *See, e.g.*, Verizon Section XV Reply at 24 (noting that certain providers exclusively provide service using VoIP).

[1995] We recognize that signaling or call detail information could be a tool for identifying VoIP-PSTN traffic, and that some providers have reached agreements to use it in this way. *See, e.g.*, XO Section XV Comments at 33; Vonage Section XV Comments at 13-14; InCharge Systems *August 3 PN* Comments at 1. Because there currently are no industry standards in this regard, however, we decline to mandate this approach industry-wide. *See, e.g.*, Level 3 *August 3 PN* Comments at 13-14.

[1996] Thus, to the extent that some commenters are concerned about the burden of implementing particular approaches or otherwise view them as undesirable, *see, e.g.*, Time Warner *USF/ICC Transformation NPRM* Comments at 16; Consolidated *August 3 PN* Comments at 22 n.30, EarthLink *August 3 PN* Comments at 15, they are free to negotiate alternatives that they view as less burdensome or more appropriate.

[1997] *See, e.g.*, Verizon Section XV Reply at 24 ("[i]f there are additional concerns, the Commission could address VoIP traffic identification through certifications"); Comcast *August 3 PN* Comments at 20 ("the Commission should require providers to certify to the accuracy of the factors they supply for VoIP-originated traffic").

[1998] See supra Section XII.C.5

[1999] *T-Mobile Order*, 20 FCC Rcd at 4862-63, para. 13.

[2000] *Id.* at 4860-64, paras. 9-14.

[2001] *Id.* at 4863-64, para. 14.

significant portions of the legacy intercarrier compensation regime have traditionally relied on tariffs, and we believe flash cutting the whole industry to a new regime would be unduly disruptive. Further, in place of tariffing, the *T-Mobile Order* required CMRS providers to negotiate interconnection agreements in good faith subject to section 252 negotiation and arbitration processes at the request of incumbent LECs—a set of requirements that we have not extended more broadly.[2002] Thus, maintaining a continuing role for tariffs during the transition to a new intercarrier compensation framework is a reasonable approach. Further, CMRS providers had expressed concerns about potentially excessive rates in wireless termination tariffs.[2003] Here, rates are ultimately subject to Commission oversight, including the mandated reductions in those charges as part of comprehensive intercarrier compensation reform. We thus conclude that this approach strikes the right balance here.

965. *Reliance on Interconnection Agreements and SGATs.* As discussed above, our transitional intercarrier compensation framework permits tariffing of charges for toll VoIP-PSTN traffic, but permits carriers to negotiate agreements that reflect alternative rates.[2004] In this regard, we note that reciprocal compensation charges generally have been imposed through interconnection agreements or state-approved statements of generally available terms and conditions (SGATs),[2005] which carriers may accept in lieu of negotiating individual interconnection agreements.[2006] Various commenters also describe the benefits that can arise from an interconnection and intercarrier compensation framework that allows parties to negotiate mutually agreeable outcomes, rather than all parties being categorically bound to a single regime.[2007] Likewise, the interconnection and intercarrier compensation framework adopted in sections 251 and 252 of the 1996 Act reflect a policy favoring negotiated agreements, where possible.

966. We recognize the concerns of some commenters that instances of disparate negotiating leverage can occur and that, absent an appropriate regulatory backstop, a regime purely relying on commercial negotiations could systematically disadvantage providers with limited negotiating

---

[2002] We deny requests to reconsider the *T-Mobile Order* above. *See supra* Section XII.C.5.b. Some commenters also have asked the Commission to extend the *T-Mobile Order* requirement that parties negotiate and arbitrate agreements pursuant to the section 252 framework to additional circumstances, and we seek comment on those requests in the FNPRM. *See supra* para 1323.

[2003] *T-Mobile Order*, 20 FCC Rcd at 4855-56, para. 1. *See also* T-Mobile USA, Inc. *et al.* Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs, CC Docket Nos. 01-92, 95-185, 96-98, at 5-6 (filed Sept. 6, 2002).

[2004] In the case of incumbent LECs, they must negotiate in good faith in response to requests for agreements addressing reciprocal compensation for VoIP-PSTN traffic. *See* 47 U.S.C. § 251(c)(1).

[2005] *See, e.g., Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., For Authorization to Provide In-Region, InterLATA Services in Connecticut*, CC Docket No. 01-100, Memorandum Opinion and Order, 16 FCC Rcd 14147, 14176, para. 67 (2001) (noting the inclusion of reciprocal compensation in the SGAT); *Application of Bellsouth Corporation, Bellsouth Telecommunications, Inc., and Bellsouth Long Distance, Inc., For Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599, para. 300 (1998) (same).

[2006] *See, e.g., Core Communications, Inc. v. Verizon Maryland, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7962, 7971, para. 24 (2003) (explaining that Core accepted the terms of Verizon's Maryland SGAT; Core and Verizon signed a schedule to the SGAT entitled "Request for Interconnection;" and, therefore, the Maryland SGAT served as the parties' interconnection agreement).

[2007] *See, e.g.*, RNK Communications Section XV Comments at 8; Verizon Section XV Comments at 13-14; Bandwidth.com *USF/ICC Transformation NPRM* Reply at 11, 15-17. As discussed above, certain state commissions also have relied on negotiated agreements for intercarrier compensation for the exchange of VoIP traffic. *See supra* para. 937.

leverage.[2008] These concerns arise in part based on the variations in size and make-up of the customers of different networks, and in part based on certain underlying legal requirements, including the general policy against blocking traffic and the lack of a statutory compulsion for certain entities to enter interconnection agreements.[2009]

967. Our transitional regime for VoIP-PSTN intercarrier compensation accommodates these disparities in several ways. For one, the ability to tariff these charges ensures that LECs have the opportunity to obtain the intercarrier compensation provided for by our rules. In addition, the section 252 framework applicable to interconnection agreements provides procedural protections. For example, it provides carriers the opportunity, outside the tariffing framework, to specify a mutually-agreeable approach for determining the amount of traffic that is VoIP-PSTN traffic.[2010] To this end, carriers could include an alternative approach in a state-approved SGAT or negotiate such an approach as part of an interconnection agreement. To the extent that the parties pursue a negotiated agreement but cannot agree upon the particular means of determining the amount of traffic that is VoIP-PSTN traffic, this can be subject to arbitration. Although most incumbent LECs are subject to this duty by virtue of the Act, while other carriers, such as competitive LECs, are not,[2011] we note that the Commission's rules already

[2008] *See, e.g.*, Cox Section XV Reply at 5 n.10; Nebraska Rural Independent Companies Section XV Reply at 16-17; PAETEC *et al.* Section XV Reply at 18-19.

[2009] *See, e.g.*, NECA *et al.* Section XV Comments at 30; Cox Section XV Reply at 5 n.10; Nebraska Rural Independent Companies Section XV Reply at 16-17; PAETEC *et al.* Section XV Reply at 18-19; XO *USF/ICC Transformation NPRM* Comments at 27. For example, IXCs, which pay access charges today, are not compelled to negotiate interconnection agreements subject to state arbitration under the terms of section 252 of the Act. *See* 47 U.S.C. § 252.

[2010] The record reveals a variety of alternatives for how providers might identify such traffic, including some in place in arrangements between particular providers today. For example, XO reports that, pursuant to some agreements addressing intercarrier compensation for VoIP traffic, it uses the JIP field on the call record to identify VoIP traffic. XO Section XV Comments at 33. *See also* Vonage Section XV Comments at 13-14 (noting possibility of including an indicator in signaling or billing information to identify VoIP traffic); *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4743-44, para. 133 n.384 (noting Level 3's proposal to use "the Originating Line Information (OLI), also known as ANI II, SS7 call set-up parameter to identify IP-enabled services traffic"). Alternatively, commenters also identify the potential to use factors or ratios—much as is done for jurisdictional purposes today—as a means of identifying the portion of overall traffic that is (or reasonably is considered to be) VoIP-PSTN traffic. *See, e.g.*, XO Section XV Comments at 33 (observing that factors could be used to indicate the percentage of terminated traffic that is VoIP, much as is done in the industry for jurisdictional purposes today); Verizon Section XV Reply at 24 (citing "standard and reliable traffic factoring methods already used today for intercarrier compensation billing purposes" as well as "certifications" and "audits"); Comcast Section XV Reply at 11 (providers could certify the percentage of traffic that is VoIP, subject to auditing). To the extent that these approaches would not identify all variations in traffic in real time, *see* Cox Section XV Reply at 3-4, the record does not demonstrate this to be a more significant issue in the case of identification of VoIP-PSTN traffic than it would be with respect to the identification of the jurisdiction of traffic today. Further, to the extent that some commenters are concerned about the burden of implementing particular approaches, *see, e.g.*, Time Warner Comments at 16, they are free to negotiate alternatives that they view as less burdensome. *See, e.g.*, Vonage Section XV Reply at 14 (observing that although "[t]o date, there has not been a business, regulatory or other reason to justify developing a universal method for identifying VoIP traffic," the industry likely will be able to identify "viable solutions that would make the identification of VoIP traffic relatively easy without requiring onerous or costly billing system changes" once it undertakes to do so).

[2011] *See, e.g., Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended et al.*, WC Docket No. 10-143, GN Docket No. 09-51, CC Docket No. 01-92, Declaratory Ruling, 26 FCC Rcd 8259 (2011); 47 U.S.C. § 252 (expressly addressing only state arbitration of interconnection agreements involving incumbent LECs).

anticipate the possibility that two non-incumbent LECs might elect to bring a reciprocal compensation dispute before a state for arbitration under the section 252 framework.[2012] To the extent that a state fails to arbitrate a dispute regarding VoIP-PSTN intercarrier compensation, it will be subject to Commission arbitration.[2013]

968. *Scope of Charges Imposed by Retail VoIP Providers' LEC Partners.* Some commenters express concern that, absent Commission clarification, certain LECs that provide wholesale inputs to retail VoIP services might not be able to collect all the same intercarrier compensation charges as LECs relying entirely on TDM networks.[2014] In particular, providers cite disputes arising from their use of IP technology as well as the structure of the relationship between retail VoIP service providers and their wholesale carrier partners.[2015] For the reasons described above, we believe a symmetric approach to VoIP-PSTN intercarrier compensation is warranted for all LECs.[2016] One of the goals of our reform is to promote investment in and deployment of IP networks. Although we believe that our comprehensive reforms best advance this goal, during the transition we do not want to disadvantage providers that already have made these investments. Consequently, we allow providers that have undertaken or choose to undertake such deployment the same opportunity, during the transition, to collect intercarrier compensation under our prospective VoIP-PSTN intercarrier compensation regime as those providers that have not yet undertaken that network conversion.[2017] Further, recognizing that these specific questions have given rise to disputes, we believe that addressing this issue under our transitional intercarrier compensation framework will reduce uncertainty and litigation, freeing up resources for investment and innovation.[2018] We therefore adopt rules clarifying LECs' ability to impose charges in such circumstances under our transitional regime, as discussed below.

969. Our transitional VoIP-PSTN intercarrier compensation rules focus specifically on whether the exchange of traffic occurs in TDM format (and not in IP format), without specifying the technology used to perform the functions subject to the associated intercarrier compensation charges. We thus adopt rules making clear that origination and termination charges may be imposed under our transitional intercarrier compensation framework, including when an entity "uses Internet Protocol facilities to transmit such traffic to [or from] the called party's premises."[2019]

[2012] *See, e.g.*, 47 C.F.R. § 51.711(a)(2) ("In cases where both parties are incumbent LECs, *or neither party is an incumbent LEC*, a state commission shall establish the symmetrical rates for transport and termination based on the larger carrier's forward-looking costs.") (emphasis added).

[2013] *See* 47 C.F.R. §§ 51.801, 51.803.

[2014] *See, e.g.*, Comcast *August 3 PN* Comments at 5-8; NCTA *August 3 PN* Comments at 17-19; Time Warner Cable *August 3 PN* Comments at 9-10.

[2015] *See, e.g.*, Comcast *August 3 PN* Comments at 5-8; NCTA *August 3 PN* Comments at 17-19; Time Warner Cable *August 3 PN* Comments at 9-10.

[2016] *See supra* para. 942.

[2017] *See, e.g.*, Level 3 *August 3 PN* Comments at 23; NCTA *August 3 PN* Comments at 17-19; Time Warner Cable *August 3 PN* Comments at 9.

[2018] *See, e.g.*, Comcast *August 3 PN* Comments at 6; NCTA *August 3 PN* Comments at 18-19; Time Warner Cable *August 3 PN* Comments at 9; Letter from Matthew A. Brill, counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92; WC Docket Nos. 10-90, 07-135, 05-337; GN Docket No. 09-51 at 1-2 (filed Sept. 21, 2011) (Time Warner Cable-Cox Sept. 21, 2011 *Ex Parte* Letter).

[2019] Letter from Mary McManus, Comcast, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 96-45; WC Docket Nos. 10-90, 07-135, 05-337, 03-109; GN Docket No. 09-51, Attach. 1 (Proposed Rule Revisions) at 2 (filed Sept. 22, 2011) (Comcast Sept. 22, 2011 *Ex Parte* Letter).

970. With respect to the issue of whether particular functions are performed by the wholesale LEC or its retail VoIP partner, we recognize that under the Commission's historical approach in the access charge context, when relying on tariffs, LECs have been permitted to charge access charges to the extent that they are providing the functions at issue.[2020] When multiple providers jointly provided access, the Commission was concerned that, for example, permitting a single competitive LEC to impose via tariff all the same charges as an incumbent LEC, regardless of the functions that competitive LEC performs, could result in double billing.[2021] In light of the policy considerations implicated here, we adopt a different approach to address concerns about double billing.[2022] As discussed above, we believe that a symmetrical approach to VoIP-PSTN intercarrier compensation is the best policy,[2023] and thus believe that competitive LECs should be entitled to charge the same intercarrier compensation as incumbent LECs do under comparable circumstances. Because the Commission has not broadly addressed the classification of VoIP services, however, retail VoIP providers that take the position that they are offering unregulated services therefore are not carriers that can tariff intercarrier compensation charges. Consequently, just as retail VoIP providers rely on wholesale carrier partners for, among other things, interconnection, access to numbers, and compliance with 911 obligations—a type of arrangement the Commission has endorsed in the past[2024]—so too do they rely on wholesale carrier partners to charge tariffed intercarrier compensation charges. Given these distinct circumstances, we adopt rules that permit a LEC to charge the relevant

[2020] As the Commission held in the *Eighth Report and Order*, "our long-standing policy with respect to incumbent LECs is that they should charge only for those services that they provide" and "[w]e believe that a similar policy should apply to competitive LECs." *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel Communications, Inc. for Temporary Waiver of Commission Rule 61.26(d) To Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, CC Docket No. 96-262, CCB/CPD File No. 01-19, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9118-19, para. 21 (2004) (*Eighth Report and Order*). Thus, for example, the Commission clarified that "the competing incumbent LEC switching rate is the end office switching rate when a competitive LEC originates or terminates calls to end-users and the tandem switching rate when a competitive LEC passes calls between two other carriers. Competitive LECs also have, and always had, the ability to charge for common transport when they provide it, including when they subtend an incumbent LEC tandem switch. Competitive LECs that impose such charges should calculate the rate in a manner that reasonably approximates the competing incumbent LEC rate." *Id.*

[2021] This is because *each* of the LECs potentially could impose the full transport and termination charges on IXCs—even though each was providing only part of those functions—and because they are tariffed charges, the IXC has no way to avoid them. *Eighth Report and Order*, 19 FCC Rcd at 9118-19, para. 21.

[2022] As discussed above, we bring all access traffic within section 251(b)(5), and the Commission had not previously addressed LECs' rights to tariff such charges in that context. Nonetheless, for convenience, our transitional intercarrier compensation framework builds upon rules, or rule language, from the access charge context in a number of ways, and we therefore modify aspects of that language in the manner discussed above, based on the record received on this issue. *See, e.g., USF/ICC Transformation NPRM*, 26 FCC Rcd at 4747-48, para. 613 (seeking comment on how to administer any approach to VoIP intercarrier compensation, including any aspect of existing law that would need to be addressed); *id.* at 4748-49, para. 616 (seeking comment on how to administer an approach adopting VoIP-specific intercarrier compensation rates).

[2023] *See supra* paras. 942, 967.

[2024] *See, e.g., IP-Enabled Services Order*, 20 FCC Rcd at 10267, para. 38. Given the Commission's endorsement of these arrangements, we find these circumstances distinguishable from those in the CMRS context, where the Commission prohibited CMRS providers from partnering with competitive LECs to collect access charges in the absence of a contract with the IXC. *See, e.g.*, Time Warner Cable-Cox Sept. 21, 2011 *Ex Parte* Letter at 2. We thus reject claims that there is no basis for distinguishing the historical treatment of CMRS providers from our actions in this context. *See, e.g.*, Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135; CC Docket No. 01-92; GN Docket No. 09-51, at 4-5 (filed Oct. 21, 2011) (AT&T Oct. 21, 2011 *Ex Parte* Letter).

intercarrier compensation for functions performed by it and/or by its retail VoIP partner,[2025] regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional TDM architecture.[2026] However, our rules include measures to protect against double billing,[2027] and we also make clear that our rules do not permit a LEC to charge for functions performed neither by itself or its retail service provider partner.[2028]

971. Our approach is supported by the fact that we are bringing all traffic within section 251(b)(5). Under Commission precedent in that context, to the extent that a competitive LEC's rates were set based on the incumbent LEC's reciprocal compensation charges, the Commission's rules were not as limiting regarding the scope of those reciprocal compensation charges as historically was the case in the access charge context.[2029] Indeed, in addition to tariffing, providers also remain free to negotiate

[2025] Going back to dial-up ISP traffic, when two telecommunications carriers exchanged traffic subject to section 251(b)(5) this was subject to intercarrier compensation even though it was an input into a connection to the Internet. *See generally ISP Remand Order*, 16 FCC Rcd 9151. Just as that order did not involve imposing intercarrier compensation requirements on the Internet, we likewise reject claims that permitting the LEC partners of a retail VoIP provider to charge the same intercarrier compensation as other LECs would be broadly imposing access charges on the Internet. *See, e.g.*, AT&T Oct. 21, 2011 *Ex Parte* Letter at 5-6.

[2026] We note that, notwithstanding our rules, to the extent that these charges are imposed via tariff, a carrier may not impose charges other than those provided for under the terms of its tariff. *See, e.g., AT&T v. Ymax*, 26 FCC Rcd 5742 (2011).

[2027] *See* Appendix A. *See also, e.g.*, Comcast Sept. 22, 2011 *Ex Parte* Letter, Attach. 1 at 2 (proposing limits to the total charges that a LEC and an affiliated or unaffiliated provider assess for jointly transporting and terminating traffic); *id.* (proposing limitations on when a competitive LEC could charge for certain services, depending on whether it is listed in the Number Portability Administration Center database as providing the calling party or dialed number); Comcast Oct. 5, 2011 *Ex Parte* Letter Attach. at 1 (same); Comcast *et al.* Oct. 24, 2011 *Ex Parte* Letter at 3 (discussing ways to protect against double billing or arbitrage).

[2028] *Cf. AT&T v. Ymax*, 26 FCC Rcd at 5757, 5758-59, paras. 41, 44 & n.120; Level 3 *August 3 PN* Comments at 21 (distinguishing its proposed approach to symmetry for imposing access charges from the *Ymax* decision, which was based on "the specific configuration of YMax's network architecture"); Level 3 *August 3 PN* Comments at 23 (advocating that LECs should be precluded, "for example, from receiving end office compensation for service provided to the calling or called party by another carrier"). Thus, although access services might functionally be accomplished in different ways depending upon the network technology, the right to charge does not extend to functions not performed by the LEC or its retail VoIP service provider partner. We thus reject claims that it is unreasonable for an IXC to pay for the functions that are performed pursuant to the intercarrier compensation framework, including the rate transition, we adopt in this Order. *See, e.g.*, AT&T Oct. 21, 2011 *Ex Parte* Letter.

[2029] *See, e.g., Local Competition First Report and Order*, 11 FCC Rcd at 16040-41, paras. 1085-86 (describing the presumption of symmetry in reciprocal compensation rates); *id.* at 16040, para. 1085 (observing that this approach "is consistent with section 252(d)(2)(B)(ii), which prohibits 'establishing with particularity the additional costs of transporting or terminating calls'"). Although state arbitrations could set reciprocal compensation rates that "that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch," *id.* at 16042, para. 1090, within that framework, the Commission did not more narrowly limit competitive LECs and CMRS providers to charging only for the functions they provide to the same degree as in the access charge context. *See, e.g., id.* (directing state commission to "consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch"); *id.* at 16042-43, para. 1091 (recognizing that carriers with different network architectures than the incumbent LEC would charge the same rate as the incumbent LEC absent a showing "that the costs of efficiently configured and operated systems are not symmetrical and justify different compensation rates, instead of being based on competitors' network architectures").